City of Sequim v. Paul Malkasian et al.

No. 74987-6

SANDERS, J. (dissenting)—Although the trial court and the Court of Appeals dismissed this declaratory judgment action for lack of *justiciability*, i.e., failure to name a defendant with a direct and substantial legal interest, the majority barely mentions the term let alone applies the doctrine. This omission by the majority of the threshold dispositive issue is bizarre. I concur fully with the Court of Appeals' conclusion this case is nonjusticiable for failure to name a defendant with a direct and substantial interest,[1] such as the county auditor or city clerk. Moreover I would award Mr. Malkasian his reasonable attorney fees under the common benefit rule.

This appeal raises two independent issues:

1. Is a preelection challenge to a ballot initiative justiciable when it fails to name as a party defendant a public official or entity responsible for placing the matter on the ballot?

2. Is a private citizen sued by the government to vindicate public policy

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[1] *City of Sequim v. Malkasian*, 119 Wn. App. 654, 662, 79 P.3d 24 (2003).

entitled to an award of reasonable attorney fees under the equitable common benefit doctrine?

I.

Justiciability

Let us begin with a simple truth. Mr. Malkasian did not bring on this litigation but has been targeted, and pummeled, by the city of Sequim for nearly a decade with all the taxpayer resources the city could bring to bear against this hapless private citizen. Initially, Mr. Malkasian was forced to defend placing the initiative on the ballot and then was required to defend the initiative from the city's constitutional attack. But at no time did he hold any official capacity in the process or any legally cognizable interest unique from any other private citizen.

In a declaratory judgment action seeking to strike a proposed initiative from the ballot, "[j]usticiability is a threshold inquiry and must be answered in the affirmative before a court may address the merits of a litigant's claim." *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005). Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish:

> "'(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.'"

Coppernoll, 155 Wn.2d at 300 (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973))).

This action named Paul Malkasian as sole defendant, identifying him as the initiative sponsor; however, Malkasian specifically *denied* the city's allegation he was "the circulator, sponsor and presenter" of the initiative petition. Clerk's Papers (CP) at 296. The city's complaint only alleges Malkasian *delivered* the petition. Partners in Government sponsored the initiative, not Malkasian.

Malkasian filed a motion to dismiss, arguing the controversy was not justiciable because the City cannot force a single citizen to bear the burden of defending a proposed or adopted city ordinance, the City lacks standing to challenge its own ordinances, and that all necessary parties had not been joined. Malkasian argued that the City could have appointed a representative of the class of its citizens or could have had counsel appointed for its ratepayers at such time as a bond issue might be jeopardized by the adopted ordinance but did not. Report of Proceedings (RP) (July 26, 2002) at 5-6.

The trial court dismissed the action as nonjusticiable. RP (July 26, 2002) at 37; Appellant's Suppl. CP at 4-5 (Order of Dismissal dated July 26, 2002). Because the agreed order bifurcated the case, the merits (i.e., evaluating the validity of the initiative under the postelection standard of review) were neither briefed by the

parties nor addressed by the trial court.

The City appealed this decision back to Division Two and briefed the merits of its case against the validity of the now passed initiative. The City dedicated only limited space in its briefing to the superior court's decision and addressed only the ability to obtain review of the validity of an initiative under the Uniform Declaratory Judgments Act. Suppl. Br. on Remand of Appellant City of Sequim at 13.

The Court of Appeals ruled the City had standing to bring an action under the Uniform Declaratory Judgments Act to seek postelection review of the validity of the initiative but held the case was not justiciable because Malkasian lacked the legal interest to defend, at his own expense, an enacted city ordinance. The Court of Appeals also denied Malkasian's request for attorney fees.

The Court of Appeals dismissed this action as nonjusticiable, holding the City cannot require a private citizen like Malkasian to defend the validity of a local ordinance stating, "The plaintiff may not set up a 'straw man' defendant whom it can easily knock over," *City of Sequim v. Malkasian*, 119 Wn. App. 654, 661, 79 P.3d 24 (2003), observing an action is justiciable only if both the plaintiff and defendant have a "direct and substantial" legal interest in the dispute. *Acme Fin. Co. v. Huse*, 192 Wash. 96, 104, 73 P.2d 341 (1937). Further, as the Court of Appeals recognized, "Because no citizen has a more direct or substantial right than

any other, no citizen acting in his individual capacity has a right that is direct or substantial enough to ensure that he or she will vigorously and effectively defend." *Malkasian*, 119 Wn. App. at 662. Because Malkasian has no more legal interest in the validity of this initiative than any other citizen, the Court of Appeals held the city cannot require him to defend the measure.

At this point the majority quarrels with the Court of Appeals' characterization of this case as a postelection rather than preelection challenge. ("Rather than address the trial court's ruling that Malkasian's initiative was within the initiative power, the Court of Appeals determined that since the matter now had 'evolved' into a postelection challenge to the voter approved initiative, Malkasian was an improper defendant." Majority at 2.) However even assuming arguendo that the majority is correct in viewing this proceeding as a preelection challenge, the question of justiciability still remains a "threshold inquiry." *Coppernoll*, 155 Wn.2d at 300. Nevertheless the majority does not address the requirement except by indirection in its discussion of Malkasian's entitlement to an award of reasonable attorney fees (which, as explained, infra, is really irrelevant to that issue). So let us consider directly the issue of justiciability for want of a proper party defendant in a preelection challenge.

It is perhaps ironic that the first case cited and relied upon by the majority is *Coppernoll v. Reed*, 155 Wn.2d 290. That case, like the case at bar, was a

preelection declaratory judgment action challenging the propriety of placing Initiative 330 (which would limit medical malpractice awards) on the ballot. This court in a unanimous decision concluded that action must be dismissed because it was not justiciable. We held the matter nonjusticiable because, whether substantively constitutional or not, the subject matter of the proposed initiative was within the legislative power. There was no justiciability problem with the parties having genuine and opposing interests which were direct and substantial "rather than potential, theoretical, abstract or academic," *id.* at 300 (quotation marks omitted), because the named party to defend that action was Sam Reed, the Secretary of State—the public official charged with responsibility for placing the matter on the ballot. However that is emphatically not the situation here, as Paul Malkasian has no official responsibility in the electoral process whatsoever.

But following the majority's logic, it would have been perfectly appropriate to name any private person involved in gathering initiative signatures, or perhaps anyone who signed the initiative petition, as the sole defendant in lieu of the secretary of state. To the contrary, I would argue the doctrine of justiciability prevents this for the same reasons advanced by the Court of Appeals that would prevent a similar postelection challenge by naming a private citizen as the sole defendant. This is necessarily true because the nature of the state and analogous local initiative procedure vests in various public officials the exclusive

responsibility to certify and place such matters on the ballot.

A citizen sponsoring a state initiative or referendum must file the proposed measure with the secretary of state. RCW 29A.72.010. The secretary of state must submit the measure to the office of the code reviser, which must recommend revisions and issue a certificate of review. RCW 29A.72.020. Upon resubmission of the measure, the secretary of state must transmit a copy to the attorney general, RCW 29A.72.020 and .040, who must prepare a ballot title and summary, RCW 29A.72.060, and file same with the secretary of state. RCW 29A.72.060. Any party may appeal *only* the ballot title and summary to the superior court of Thurston County for final review. RCW 29A.72.080. *And see Coppernoll*, 155 Wn.2d at 298 n.5. Upon timely submission of the requisite number of signatures, the secretary of state must file the measure, unless it fails to satisfy procedural requirements. RCW 29A.72.150 through .170. If the secretary of state refuses to file the measure, its *sponsor* may apply for a writ of mandate in the superior court of Thurston county, RCW 29A.72.180, and petition the Supreme Court for review. RCW 29A.72.190. *See Schrempp v. Munro*, 116 Wn.2d 929, 935, 809 P.2d 1381 (1991) (holding chapter 29A.72 RCW empowers only proponents of initiative to challenge secretary of state's filing decision).

If a filed measure contains sufficient verified and canvassed signatures,

RCW 29A.72.230, the secretary of state must certify it to the county auditors for inclusion on the ballot. RCW 29A.72.250. At this point, any citizen may apply to the Superior Court of Thurston County for a writ of mandate compelling—or an injunction preventing—certification of the measure. RCW 29A.72.240.

As the legislative scheme governing a state initiative or referendum clearly illustrates, a preelection action concerning the validity of an initiative or referendum typically takes the form of an application for a writ of mandate compelling or injunction prohibiting a public official from filing or certifying the measure. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 715-16, 911 P.2d 389 (1996) (holding party challenging initiative as inappropriate for direct legislation must "seek an injunction to prevent the measure from being placed on the ballot"). *See, e.g., Sudduth v. Chapman*, 88 Wn.2d 247, 248-49, 558 P.2d 806 (1977) (reviewing application for writ of mandate compelling secretary of state to certify initiative); *Hanson v. Meyers*, 54 Wn.2d 724, 726, 344 P.2d 513 (1959) (reviewing application for injunction prohibiting secretary of state from certifying initiative); *State ex rel. Evich v. Superior Court*, 188 Wash. 19, 20, 61 P.2d 143 (1936) (same). Any party may challenge the attorney general's formulation of a measure's ballot title and summary and the secretary of state's decision whether to certify a measure, but only the sponsor of a measure may challenge the secretary of state's decision whether to

accept and file the measure. *State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 414-15, 302 P.2d 202 (1956). Thus, opponents of a proposed measure cannot challenge its validity until and unless it is certified by the secretary of state. *See Edwards v. Hutchinson*, 178 Wash. 580, 584, 35 P.2d 90 (1934). And the secretary of state defends the action.

The Sequim Municipal Code adopts the simpler but structurally similar legislative scheme governing the proposal of a commission or code city initiative or referendum. *See* SMC 1.15.010 (adopting code city initiative and referendum power provided under RCW 35A.11.080 through .100, referring to commission city power under RCW 35.17.240 through .360)). Any person may propose a city ordinance by initiative petition. RCW 35.17.260. The sponsor must file an initiative petition in the proper form, RCW 35.17.270, signed by sufficient registered voters of the city, RCW 35.17.260, with the city clerk. RCW 35.17.280. If the petition meets procedural requirements and contains sufficient signatures, the city clerk must certify the petition to the city council, RCW 35.17.280, which must pass the proposed ordinance or put it to the voters. RCW 35.17.260. Any taxpayer may commence an action in the superior court "against the city" challenging the city clerk's decision not to certify the petition to the council, the council's failure to pass the ordinance or put it to the voters, or the county auditor's decision whether to certify the measure for vote. RCW 35.17.290.[2] Expressly, any such preelection

action must proceed "against the city" rather than against the private citizen who may support or oppose the initiative.

In sum, a preelection action relating to whether the initiative or referendum is properly placed on the ballot must take the form of an action compelling or an injunction prohibiting the relevant public official from filing or certifying the measure. The public officials charged with filing and certifying an initiative or referendum brought under the Sequim Municipal Code are the Sequim city clerk and the county auditor. SMC 1.15.010. Accordingly, the Sequim City Council should have named the Sequim city clerk or county auditor as the appropriate and necessary defendant.

If the voters approve an initiative or referendum, the measure's opponents may apply for a writ of mandate compelling or an injunction prohibiting the relevant public official from certifying the results of the vote. *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 53, 65 P.3d 1203 (2003). Alternatively, a party directly affected by the enacted measure may bring an action against a party charged with enforcing the measure, requesting a judgment declaring the measure unconstitutional. *See*, *e.g.*, *Acme Fin. Co.*, 192 Wash. at 107. Such an action may

[2] "If the clerk finds the petition insufficient or if the commission refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court *against the city* . . . ." RCW 35.17.290.

also take the form of an action against a willing and interested party, appointed by the court as the representative of all interested parties.

As the Court of Appeals correctly recognized, the legislative scheme governing challenges to the validity of a bond issue contemplates precisely such an action. *See Malkasian*, 119 Wn. App. at 661. Under chapter 7.25 RCW, when a governmental entity applies for a judgment confirming the validity of a proposed bond issue, RCW 7.25.010, the court must name one or more willing and interested parties as defendants representing all interested parties and require the governmental entity to pay reasonable attorney fees to defendant's counsel. RCW 7.25.020.

In any case, the majority contends this action remains a "preelection challenge." Majority at 11. Accordingly, it should have taken the form of an action prohibiting the city clerk or county auditor from certifying the initiative for vote or placing it on the ballot. *See Philadelphia II*, 128 Wn.2d at 715-16. Instead, the Sequim City Council brought an action against Malkasian, not the county auditor, the Sequim city clerk, or any other public official. Nor was Malkasian named as representative of all interested parties. In fact, the City Council named him as defendant in his individual capacity, not as representative of anyone. He was never a willing defendant. Such an action is unprecedented, improper, and procedurally absurd.

Of course, any interested party may apply for a writ of mandate compelling a public official or entity to file or certify a proposed or enacted initiative or referendum, including the measure's sponsor. *See, e.g.*, *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 P. 92 (1916); *State ex rel. Griffiths v. Superior Court*, 92 Wash. 44, 159 P. 101 (1916); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971); *Ruano v. Spellman,* 81 Wn.2d 820, 505 P.2d 447 (1973); *Leonard v. City of Bothell,* 87 Wn.2d 847, 557 P.2d 1306 (1976); *Heider v. City of Seattle*, 100 Wn.2d 874, 675 P.2d 597 (1984); *Bidwell v. City of Bellevue*, 65 Wn. App. 43, 827 P.2d 339 (1992); *Philadelphia* II*,* 128 Wn.2d 707; *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005). But in such a case, the private party is the plaintiff, not the defendant.

However, as the majority notes, this court has on occasion entertained a challenge to a proposed or enacted initiative or referendum naming a private party as defendant in his individual capacity. Majority at 21-22. *See Whatcom County v. Brisbane*, 125 Wn.2d 345, 347, 884 P.2d 1326 (1994) (application for judgment declaring certified referendum invalid defended by sponsor of referendum); *Snohomish County v. Anderson*, 124 Wn.2d 834, 837, 881 P.2d 240 (1994) (application for judgment declaring proposed referendum invalid defended by all

signatories of referendum); *Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 329, 76 P.3d 727 (2003) (application for injunction prohibiting certification of proposed initiative defended by sponsor of initiative).[3] Concern for "judicial economy" surely compelled us to overlook such an egregious error in these few instances. *Philadelphia II*, 128 Wn.2d at 716. But in any event, none of these defendants objected to or otherwise challenged in any way the justiciability of the action. That was not an issue to be decided. But here the issue *is* justiciability. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). *See also Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) (questions neither brought to a court's attention nor ruled upon are not precedential); *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459, 48 P.3d 274 (2002) (holding "this court is not constrained to follow a decision where the opinion's holding controls an issue, but the issue was not raised in the case"). We

[3] The majority also cites *Seattle Building & Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 745, 620 P.2d 82 (1980), in support of the premise a party may bring an action challenging a proposed initiative or referendum against a private party in its individual capacity. In fact, this case concerned an application for an injunction prohibiting the certification of a proposed initiative, properly brought by a private party opposed to the initiative and filed against the city government charged with submitting the initiative to vote.

certainly should not encourage parties to file such inappropriate actions in the future, nor should we decide this case on the merits when, as here, justiciability is properly challenged.

The Sequim City Council—and the majority—has used Malkasian as if to say, "let us overwhelm this isolated private citizen, knock him out, and then, by so doing, deprive all other citizens of Sequim their day in court and the benefits of their initiative." If this is a justiciable controversy, what's next? Suppose a citizen, a group, a business, or a local unit of government believes a state statute violates the constitution. Who should they sue? Why not sue an isolated citizen activist who supported the statute? Or a legislator who sponsored it? Or any other party lacking the financial wherewithal to mount an adequate defense?

Most likely any such party will simply default. At least, they would if they had any sense, as few can afford to invest 10 years and vast sums of money defending a law for the sake of the indirect and tangential benefits it may afford them. But is this any way to shape public policy? Does it serve the ends of justice? The doctrine of justiciability protects individuals and society alike from such mercenary tactics.

In sum, while a party may challenge the validity of a proposed initiative or referendum, state or local, such a challenge is valid only if filed at the proper time, in the proper form, and against the property party. The Sequim City Council

could have challenged the validity of this initiative by applying for an injunction prohibiting the city clerk from certifying the initiative or the county auditor from placing it on the ballot or certifying the result of the vote. Thereafter, it could have requested a judgment declaring the enacted initiative invalid naming an appropriate official from the executive branch charged with its enforcement to defend. But it cannot bring a preelection action against a private citizen in his individual capacity.

Neither our legislative scheme nor our doctrine of justiciability supports the majority's decision. The result reflects only the majority's unrestrained will to obtain an end without regard for legitimate means. By this measure, of course, it triumphs.

II.

Mr. Malkasian is entitled to recover his reasonable attorney fees under the common benefit rule

Proper party or not, Malkasian is entitled to reasonable attorney fees under the common benefit rule.[4] The Court of Appeals denied Malkasian's request for reasonable attorney fees, reasoning he might have been entitled to fees had he "secured his appointment as a representative of the City's taxpayers," but was not because "he elected to remain in his individual capacity and secure a dismissal for

[4] The majority mischaracterizes the ground for an award of unreasonable attorney fees as the claim Malkasian is not a proper party. Majority at 20.

lack of justiciability." *Malkasian*, 119 Wn. App. at 664.

Malkasian attacks the use of the term "elected." Malkasian is correct that this term is inappropriate since Malkasian did not choose to be a named defendant.[5] He was the defendant at the city's election, not his own.

Washington follows the American Rule on attorney fees. "The American Rule on attorney fees is that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity." *McGreevy v. Or. Mut. Ins. Co.,* 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995). Malkasian has not cited any statutory or contractual basis for recovering attorney fees. Therefore the basis, if any, must be some "recognized ground in equity." *Id.*

Malkasian analogizes to one such recognized equitable basis for awarding attorney fees: the substantial benefit/common fund ground.[6] Although this is not a case concerning preservation of assets, the rationale behind this doctrine equally applies here.

"[T]he power to award attorney fees 'springs from our inherent equitable powers, [and] we are at liberty to set the boundaries of the exercise of that power.'"

[5] Regardless of whether Malkasian "elected" to be dismissed from the case on justiciability grounds, the City forced Malkasian to defend the ordinance by naming him as sole defendant and continuing to prosecute the case after Malkasian notified the City that he was an improper defendant.

Hsu Ying Li v. Tang, 87 Wn.2d 796, 799, 557 P.2d 342 (1976) (alteration in original) (quoting *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974)). In *Tang* we held the substantial benefit/common fund ground did not apply because the decision benefited only the litigant, yet the court still awarded attorney fees based on the equity of the individual situation.

The substantial benefit/common fund doctrine is recognized to provide a basis for an award of reasonable attorney fees beyond the mere creation or preservation of a monetary fund[7] where a litigant confers substantial benefits on an

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[6] "In the absence of a contract or a statute, a recognized Washington exception to the general rule of no attorney fee recovery is the 'common fund' exception, which applies where the litigant created or preserved a specific monetary fund for the benefit of others as well as himself, from which fund equity may allow reimbursement of attorney fees. This exception has been broadened to include situations where a litigant confers a substantial benefit on an ascertainable class, such as corporate stockholders." *Interlake Porsche & Audi, Inc. v. Bucholz,* 45 Wn. App. 502, 521, 728 P.2d 597 (1986).

[7] As the majority points out, a number of prior decisions have indeed applied the doctrine to the creation or preservation of monetary funds or other benefits, even when a fund did not exist. For example *Bowles v. Washington Department of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1993) was a class action against the State Department of Retirement Systems by members of a public employees retirement system plan. Members sought declaratory and injunctive relief, claiming the Department did not properly calculate retirement pensions by failing to include lump sum payments of accrued but unused vacation and sick leave benefits. The plaintiff class prevailed and was awarded substantial reasonable attorney fees under the common fund/common benefit theory against the State although the action did not result in any money judgment but only declaratory/equitable relief. The plaintiffs argued that their suit created or preserved the fund because the suit secured additional pension benefits for many other Public Employees Retirement System I members, and this court agreed. However, neither *Bowles* nor most of the

ascertainable class. *See, e.g., Weiss*, 83 Wn.2d at 912-13 (and cases cited therein). In *Weiss* the class was Washington's taxpayers, and the benefit was the halting of the disbursement of funds under an unconstitutional statute. *Id.*

Malkasian's entitlement to an award of reasonable attorney fees is most specifically based upon that prong of the doctrine illustrated by *Seattle Trust & Savings Bank v. McCarthy*, 94 Wn.2d 605, 612-13, 617 P.2d 1023 (1980).[8] There the bank and trust corporation sought a declaratory judgment to establish the constitutionality of an amendment to its articles of incorporation which removed the preemptive right of shareholders to purchase unissued shares. McCarthy was named defendant to represent the rights of minority shareholders potentially prejudiced by the action. The corporation ultimately prevailed. This court then considered whether or not McCarthy should be awarded his reasonable attorney fees on the appeal which he lost. We answered yes because the suit was brought to obtain an adjudication for the benefit of the corporation, notwithstanding that the

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other cases cited concerned the claim that representative defendant in an action such as this would also be entitled to an award of reasonable attorney fees under the equitable doctrine.

[8] The equitable doctrine has been previously applied in cases where the right to future pension benefits was gained, *Bowles v. Department of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1993), where two legislative acts involving financial aid were found to be unconstitutional, *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), and where a cemetery was maintained. *German Evangelical St. Marcus Congregation of St. Louis v. Archambault,* 404 S.W.2d 705 (Mo. 1966).

defendant had a substantial financial interest to protect.

> It was in the interest of the corporation that the question be vigorously defended, in order to resolve questions concerning the legality of amendment of shareholders' rights. To achieve this end, a decision of this court was necessary, since a trial court judgment would be of little precedential value. If the defendant is forced to pay his attorney fees on appeal, the reasonableness of which has not been questioned, he will have conferred an essentially gratuitous benefit on the corporation.

Id. at 612. Of particular importance to the case at bar, the unanimous opinion continued:

> While it is the general rule that attorney fees will be allowed only where provided by statute or contractual obligation, we have recognized limited exceptions to this rule, among them the rule that equity may allow reimbursement of attorney fees from a fund created or preserved by a litigant for the benefit of others as well as himself. This rule we said in *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), has been broadened to include situations where a litigant confers some other substantial benefit on an ascertainable class, such as corporate stockholders. The right to award attorney fees in limited, special situations, we said, springs from our inherent equity powers.
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> It is true that here the defendant was cast in the role of apparently opposing, rather than defending, the corporate interest . . . . Under the peculiar circumstances of the case, the very act of diligently opposing served to benefit the corporation, as it aided in clarifying the issue and brought into focus the need to abandon a legal doctrine which threatened the corporation's health and growth. The defendant performed his function as a person named by the plaintiff to represent the class of minority shareholders, in order to facilitate the declaratory judgment which it sought. Under these circumstances, the plaintiff has already recognized that it should pay the defendant's attorney fees at the trial level. To do complete equity, it must also pay them here. It is so ordered.

Id. at 612-13.

So too in the case at bar. The City of Sequim had an arguably legitimate interest to attempt to remove an initiative from the ballot or invalidate it once passed. To vindicate this interest the City of Sequim named Mr. Malkasian sole defendant in an apparent effort to preclude the rights of all others by obtaining a favorable declaratory judgment. The equitable doctrine therefore allows an award of reasonable attorney fees to Mr. Malkasian because his opposition "served to benefit" the municipal corporation.

By defending the validity of an adopted city ordinance, Malkasian was not merely involuntarily representing the sponsors of the initiative, or the 78 percent of voters who approved it, but the entire citizenship of the city. Malkasian provided the same service to the citizens of Sequim that the city attorney provides when he defends an adopted city ordinance in a declaratory judgment action—at taxpayer expense. This defense benefited the ascertainable class comprised of the citizens of Sequim and justifies an award to Malkasian of his reasonable attorney fees and expenses regardless of result.[9]

Conclusion

[9] Although RCW 7.25.020 is not directly applicable because it relates solely to the validity of actual bonds, analogy to this statute also supports Malkasian's claim. *See Malkasian*, 119 Wn. App. at 662. As was the case in *Seattle Trust & Savings Bank v. McCarthy*, this entitlement is not dependent on the outcome of the litigation or the fault of a party, if any.

We accepted review of a Court of Appeals decision which directed this action be dismissed for lack of justiciability. But our majority seems unable to muster any argument why the reasoning of the Court of Appeals was wrong—only its result is not to its liking. Malkasian is also entitled to recover his reasonable attorney fees.

I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice James M. Johnson